HENG HANG KHIM

v.

SINEO ENTERPRISE SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
AZAHAR MOHAMED J
[ORIGINATING SUMMONS NO: 24-423-1999(4)]
6 APRIL 2007

CONTRACT: *Damages - Breach - Appeal against assessment of damages - Whether there was a fundamental breach of contract - Whether deputy registrar's assessment of damages in direct conflict with order of Court of Appeal - Whether deputy registrar exercised judicial discretion correctly*

CIVIL PROCEDURE: *Damages - Assessment of damages - Appeal against - Whether there was a fundamental breach of contract - Whether deputy registrar's assessment of damages in direct conflict with order of Court of Appeal - Whether deputy registrar exercised judicial discretion correctly*

This was an appeal by the defendant against the decision of the learned deputy registrar ordering the defendant to pay the plaintiff the sum of RM63,800 as damages for breach of contract. By a sale and purchase agreement ('SPA') entered into between the parties, the plaintiff agreed to purchase a condominium unit from the defendant for the purchase price of RM319,000. Pursuant to the SPA, the plaintiff paid 20% of the purchase price (aggregating RM63,800) to the defendant. However, as a result of the defendant's breach of the SPA by its failure to deliver vacant possession to the plaintiff before the expiry of the 36-month period, the plaintiff terminated the SPA and brought an action against the defendant. The learned judge found for the plaintiff, ordering the defendant to refund to the plaintiff the sum of RM63,800 and to pay general damages as a result of the termination, to be assessed by the registrar. The defendant appealed to the Court of Appeal, which allowed the defendant's appeal in part and ordered: (i) the setting aside of the order for the refund of the sum of RM63,800 to the plaintiff; and (ii) the defendant to pay the plaintiff general damages as a result of the termination, to be assessed by the registrar. The plaintiff took out

A a summons in chambers for the assessment of damages and the learned deputy registrar awarded damages to the plaintiff amounting to RM63,985, which included the sum of RM63,800 paid to the defendant as part purchase payment. Dissatisfied with that decision, the defendant appealed, submitting that the order of
B the learned deputy registrar was in direct conflict with the order of the Court of Appeal. It was contended that the learned deputy registrar was bound by the Court of Appeal's decision in that the defendant was not required to refund the sum of RM63,800.

C **Held (dismissing the appeal):**

(1) It is of significance to note that as time was provided to be of the essence of the SPA, the stipulated time period within which the condominium had to be delivered to the purchaser became an essential condition of the agreement. The
D defendant's failure to complete within the time stipulated amounted to a fundamental breach of the contract. Thus, the plaintiff was at liberty to elect either to terminate the SPA and sue for damages or to deal with the agreement as continuing and sue for damages. The plaintiff in this case had elected to
E terminate the SPA and as an innocent and non-defaulting party, he had the right to terminate it by rescission. The Court of Appeal upheld the learned judge's decision that the plaintiff had terminated the SPA due to the breach caused by the defendant. The Court of Appeal had affirmed the order for
F damages to be assessed, and it was on that basis that the learned deputy registrar proceeded to deal with the assessment of damages. The Court of Appeal never ruled that the plaintiff was estopped from claiming the sum of RM63,800. (para 7)

G **(2)** The 20% of the purchase price paid by the plaintiff was obviously part of the damages suffered by the plaintiff consequent upon the breach caused by the defendant. On the facts of the case, it would be more commensurate with justice that the plaintiff, the innocent party, received compensation for
H the sum of RM63,800 that he had already paid to the defendant as the part purchase price. The law should be able to safeguard the interest of the plaintiff, the non-defaulting party. It would be wrong and it would give rise to injustice to allow the developer, who failed to deliver vacant possession
I within the stipulated period in an agreement where time is of the essence, go scot-free and off the hook without compensating the purchaser who had already paid to the

developer part of the payment towards the purchase price. That would enable the developer to gain an advantage or a benefit resulting from its own fault. One of the benefits that the defendant, the defaulting party, had received under the SPA was the payment of 20% of the purchase price. Therefore, the defendant's appeal was without merit and unsustainable. The learned deputy registrar had rightly exercised his judicial discretion in awarding the damages in the sum of RM63,985 to the plaintiff. It had not been shown that the learned deputy registrar's discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there had been a miscarriage of justice. (para 14)

Case(s) referred to:

Central Malaysia Development Co Ltd v. Chin Pak Chin [1967] 2 MLJ 174 ***(refd)***

Vasudevan v. Damodaran & Anor [1981] CLJ 84; [1981] CLJ (Rep) 101 FC

Legislation referred to:

Contracts Act 1950, s. 74

Other source(s) referred to:

BN Krishnan, *Law Of Damages and Compensation,* 2nd edn, p 561

Pollock & Mulla, *Indian Contract and Specific Relief Acts,* 12th edn, vol 11, p 1585

For the plaintiff - Goh Mey Foon; M/s Leng & Co
For the defendant - Ang Boon Heng; M/s Ang & Co

Reported by Suresh Nathan

JUDGMENT

Azahar Mohamed J:

[1] This was an appeal to the judge in chambers (encl. 33) by the defendant against the decision of the learned deputy registrar given on 6 June 2006 whereby the defendant was ordered to pay the plaintiff a sum of RM63,800 as damages for breach of contract.

[2] To put things in proper context, it is important to set out the factual background and the sequence of events relevant to this appeal. By the sale and purchase agreement dated 3 October 1995 (the 'SPA') entered into between the plaintiff and the defendant, a developer for the sale and purchase of a condominium known as Unit #13A-03A, Type A, Block 2, Skudai Parade, Johor Bahru, Johor ('the Condo'), the defendant agreed to sell and the plaintiff agreed to purchase the Condo unit with a floor area of 1,316.36 sq. ft at and for the purchase price of RM319,000. The SPA was a standard sale and purchase agreement for undivided building prescribed under the Housing Developer (Control and Licensing) Regulation 1989. Pursuant to the SPA, 20% of the purchase price (aggregating RM63,800) had been paid by the plaintiff to the defendant. The defendant had breached the SPA by failing to deliver vacant possession of the Condo to the plaintiff on or before 3 October 1998 ie, on or before the expiry of the 36 month period. As a result thereof, the plaintiff terminated the SPA *vide* the plaintiff's solicitors' letter of 3 November 1998. Thereafter the plaintiff brought the action herein against the defendant claiming, *inter alia,* the following:

1. a declaration that the SPA had been terminated;

2. the refund of 20% purchase price paid by the plaintiff to the defendant under the SPA; and

3. payment of damages to be assessed consequent upon the termination of the SPA.

[3] On 8 January 2001 the learned judge granted the declaration and also made the following orders:

1. the defendant was to refund to the plaintiff a sum of RM63,800 being the 20% of the purchase price paid;

2. the defendant was to pay general damages as a result of the termination to be assessed by the registrar.

[4] Soon afterwards the defendant filed an appeal against that decision to the Court of Appeal. On 25 November 2004, the Court of Appeal allowed, in part, the defendant's appeal and ordered:

1. the order that the defendant was to refund the sum of RM63,800 was set aside;

2. the defendant was to pay to the plaintiff general damages as a result of the termination, to be assessed by the registrar; and

3. the defendant to pay 1/3 costs of the appeal.

[5] Following the order of the Court of Appeal, the plaintiff afterwards took out a summons in chambers for the assessment of damages. At the assessment of damages stage, the plaintiff filed a witness statement and the plaintiff's bundle of document. The learned deputy registrar awarded damages to the plaintiff in the sum of RM63,985, which included the sum of RM63,800 paid to the defendant as part purchase payment.

[6] The defendant being dissatisfied with that decision appealed to this court. During the argument of the appeal before me, learned counsel for the defendant submitted that the order of the learned deputy registrar was in direct conflict with the order of the Court of Appeal. It was said that the learned deputy registrar was bound by the decision of the Court of Appeal in that the defendant was not required to refund the sum of RM63,800.

[7] I now move on to consider the submission of learned counsel for the defendant. I could not agree with it. In the first place, it is of significance to note that as time was provided to be the essence of the SPA (see cl. 7), the stipulated time period within which the Condo had to be delivered to the purchaser (see cl. 22(1)) became an essential condition of the agreement. The stipulated period within which the Condo had to be delivered to the plaintiff was a covenant so fundamental to the performance of the SPA. The defendant had failed to complete within time. The defendant's conduct amounted to a fundamental breach of contract. In view of the fact that the defendant was in breach of this condition, the plaintiff was at liberty to elect either to terminate the SPA and sue for damages or to deal with the agreement as continuing and sue for damages. The plaintiff in this case had elected to terminate the SPA by the issuance of the notice of termination of the SPA by his solicitor. He had the right to do so. As an innocent and non-defaulting party, the plaintiff had the right to terminate it by recission. The Court of Appeal

upheld the decision of the learned judge that the plaintiff had terminated the SPA due to the breach caused by the defendant. The Court of Appeal had affirmed the order for damages to be assessed. It was on the basis of this that the learned deputy registrar proceeded with the assessment of damages. I would observe that the Court of Appeal never ruled that the plaintiff was estopped from claiming the sum of RM63,800.

[8] The general principle for the assessment of damages is compensatory. Now, s. 74 of the Contracts Act 1950 provides that when a contract has been broken, the party who suffers by the breach is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arise in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. I find it necessary to reproduce the provision. This is what it says:

> **Compensation for loss or damage caused by breach of contract.**
>
> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.
>
> (3) Compensation for failure to discharge obligation resembling those created by contract.
>
> When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default as if the person had contracted to discharge it and had broken his contract.
>
> Explanation – In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

[9] Illustration (r) to s. 7 is the most illustrative. It reads as follows:

> r) A, a shipowner, contract with B to convey him from Kelang to Sydney in A's ship, sailing on the 1st of January, and B pays to A, by way of deposit, one-half of his passage-money. The ship does not sail on the 1st of January, and B, after being, in consequence, detained in Kelang for some time, and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, arriving too late in Sydney, loses a sum of money. A is liable to repay to B his deposit, with interest, and the expense to which he is put by his detention in Kelang, and the excess, if any, of the passage-money paid for the second ship over that agreed upon for the first, but not the sum of money which B lost by arriving in Sydney too late.

[10] I would like to point out that the above illustration uses the phrase "A is liable to repay B his deposit, with interest" to describe the kind of the remedy available for the damage caused by a breach of contract. The phrase captures the essence of the point that I want to make. This was the principle as I saw it. It seems clear to me that recovery of the sum paid as part purchase payment is allowed under s. 74 as compensation for loss or damage caused by breach of a contract. To make this point clear, I should refer to the judgment of Gill J (as he then was) in *Central Malaysia Development Co. Ltd v. Chin Pak Chin* [1967] 2 MLJ 174 where the learned judge had this to say at p 177 on the subject of s. 74:

> It is to be observed that the section is general in its terms, and does not exclude the case of damages for breach of a contract to sell immoveable property. In other words, the legislature has not prescribed a different measure of damages in the case of contracts dealing with land from the laid down in the case of contracts relating to commodities. Where, therefore, a purchaser of land claims damages for the loss of his bargain, the question to be decided is whether the damage alleged to have been caused to him "naturally arose in the usual course of things from such breach".

[11] And further down at p 178 the learned judge said:

> In the result the plaintiff's are entitled to recover the sum of $60,000 which they paid as deposit on the date of the agreement together with a reasonable rate of interest.

[12] Textbooks authority in general supports the proposition that a breach on the part of the vendor entitles the purchaser to recover damages for his deposit and other payments towards the price paid by him. According to Justice BN Krishnan, *Law Of Damages and Compensation* (2nd edn) at p 561:

> A breach on the part of the vendor, for whatever cause, entitles the vendee to a refund of the earnest money paid, or advances towards the price paid by him, in addition to other damages, if any.

[13] See also *Pollock & Mulla, Indian Contract and Specific Relief Acts* (12th ed) Vol. 11, which expressed a similar view at p 1585.

[14] Returning to our present case and applying the foregoing principles to the facts of the case before me, the crucial point was whether the learned deputy registrar had rightly assessed the damages as RM63,985. To my mind it was a fair and reasonable award. The 20% of the purchase price paid by the plaintiff was obviously part of the damages suffered by the plaintiff consequent upon the breach caused by the defendant. On the facts of the case, it would to be more commensurate with justice that the plaintiff, the innocent party received compensation for the sum of RM63,800 that he had already paid to the defendant as part purchase price. The law should be able to safeguard the interest of the plaintiff, the non-defaulting party. It would in my view be wrong and would give rise to injustice to allow a developer, who failed to deliver vacant possession within the stipulated period in an agreement where time is of the essence, go scot-free and off the hook without compensating the purchaser who has already paid to the developer part of the payment towards the purchase price. That would enable the developer to gain advantage or benefit of its own fault. One of the benefits which the defendant, the defaulting party had received under the SPA, was the payment of the 20% of the purchase price. So I was satisfied that the defendant's appeal in encl. 33 was without merit and unsustainable. To my mind, the learned deputy registrar had rightly exercised his judicial discretion in awarding the damages in the sum of RM63,985 to the plaintiff. It had not been shown to me that the discretion of the learned registrar had been exercised on a wrong principle and should have been exercised in a

contrary way or that there had been a miscarriage of justice. (See: *Vasudevan v. Damodaran & Anor* [1981] CLJ 84; [1981] CLJ (Rep) 101).

[15] In the result, for the reasons already given, the appeal in encl. 33 was dismissed with costs. The order of the learned deputy registrar was quite right and I affirmed it.